No. 76.

Brf. of Lewis for Appellee.

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BRIEF FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES

No. 76.

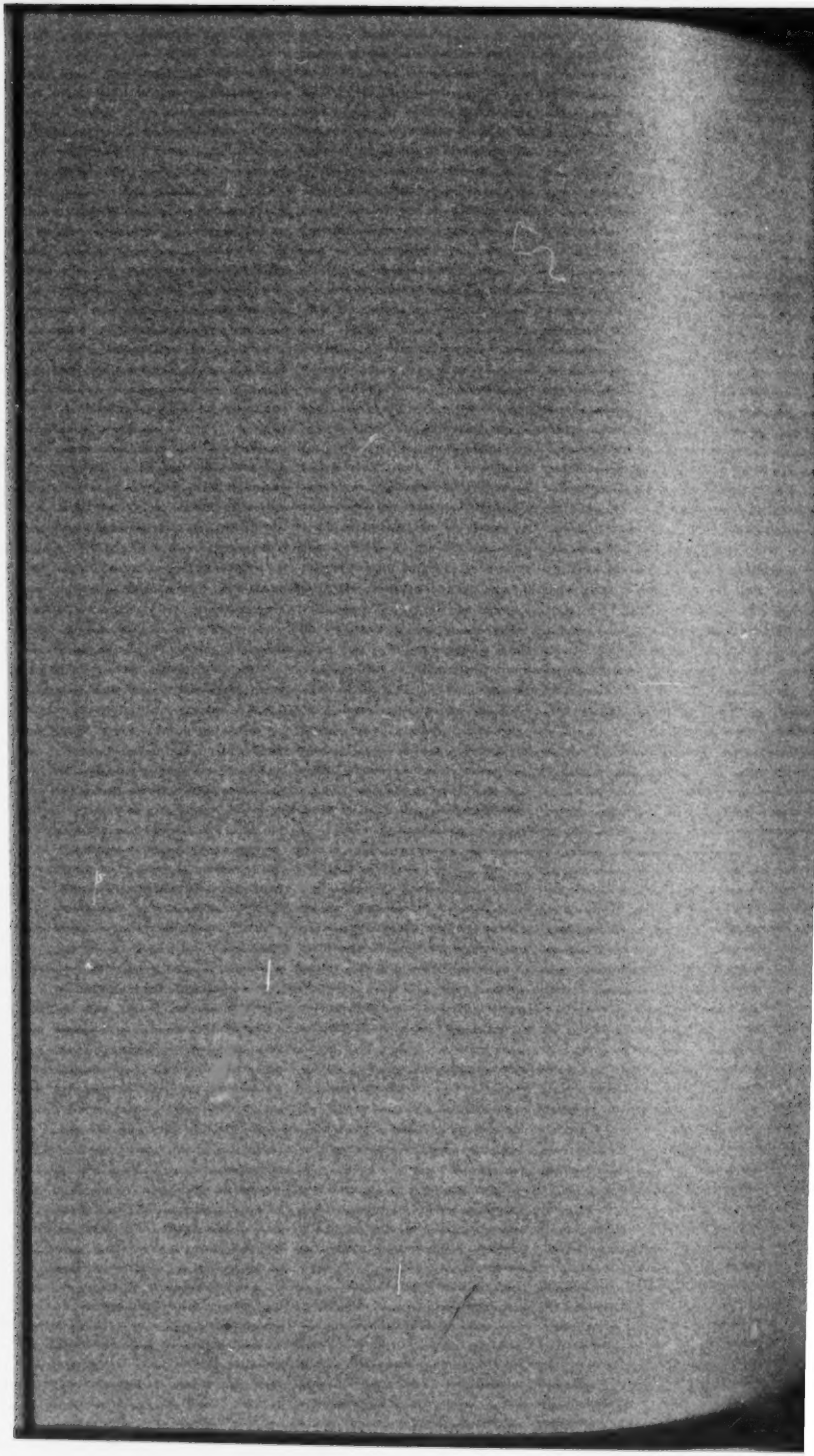
PEYMANN BREWING COMPANY, APPELLANT,

vs.

HARRY BRISTOR, TREASURER OF THE COUNTY OF JEFFERSON, IN THE STATE OF OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF ADDISON C. LEWIS, COUNSEL FOR APPELLEE.



SUPREME COURT OF THE UNITED STATES.

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vs.

HARRY BRISTOR, TREASURER OF THE COUNTY OF JEFFERSON, IN THE STATE OF OHIO.

STATEMENT.

An examination of the agreed statement of facts in this case will show that appellant, by its agent, made sales of beer at the store house in Steubenville, Ohio, as well as solicited orders among its customers at their places of business and filled such orders from said store house. (See Record, p. 12, 13).

Perhaps this fact does not appear so clearly in the statement of facts made by appellant's counsel.

ARGUMENT.

That appellant 'trafficked' in intoxicating liquors at Steubenville, Ohio, under the facts of this case, there would seem to be no room for question.

To 'traffic' means "to pass goods and commodities from one person to another for an equivalent in goods or money; to buy *or* sell goods."—(See Webster).

In the language of Judge Thompson of the Circuit Court, if the manufacturers "establish places within the State distinct from the manufactory, where their goods are to be stored, for the purposes of sale and delivery, and such goods are there sold and delivered, then they become traffickers within the meaning of the law, and are liable to pay the tax."

See Record, p. 15.

Peitz v. The State, 68 Wis., 538.
Black on Intox. Liquors, §141.

It has been held that a brewer cannot engage in the retail trade without taking out a license as a retailer.

69 Amer. Dec., 226.
45 N. W. Rep., 149.
22 Atl. Rep., 1.
68 Wisc., 538.

By the terms of the Dow Law itself it is manifest that the legislature, by excluding sales at the manufactory "in quantities of one gallon or more," intended to include in the phrase "trafficking in intoxicating liquors" the manufacture and sale at the manufactory of smaller quantities.

Revised Stats. of Ohio, §8899.
Appellant's Brief, p. 4, (Appendix).

And so wherever in the State the Ohio brewer establishes a store house separate and apart from the brewery, for the sale of his product in the original package, he is required to, and does pay the Dow tax without regard to the quantity sold at any one time.

The Wilson act is as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

26 Stat. 313.

Now the beer shipped by appellant into the State of Ohio, being sold there by it after the same arrived at Steubenville, it is clearly subject to the operation and effect of the laws of that State enacted in the exercise of its police powers.

But the appellant complains that the Dow Law is not a valid exercise of the police power of the State for various reasons specified in the brief of its counsel.

Without entering upon a tedious discussion of this question, suffice it to say the Court will find it ably and satisfactorily considered and decided in the case of *Adler v. Whitbeck, 44 Ohio State, 539, 563, 567, et seq.*

"From the fact that the State law permits the sale of liquor, subject to particular restrictions, and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State. The plain purpose of the act of Congress having been to allow State regulations to operate upon the sale of original packages of intoxicants coming from other States, it would destroy its obvious meaning to construe it as permitting the State laws to attach to and control the sale only in case the States absolutely forbade sales of liquor, and not to apply in case the States determined to restrict or regulate the same."

Vance v. Vandercook Co., 170 U. S., 447, 448.

But it is insisted by appellant's counsel that the Dow Law is invalid because it discriminates against the foreign brewer in this, that sales by the local brewer,

at the brewery, in quantities of a gallon or more, are specially exempt from the tax. We submit the objection is superficial and without weight.

The Dow Law, instead of discriminating against, if it discriminates at all, operates by its restrictions in favor of the foreign manufacturer. For he may send his agents into Ohio to *solicit* orders, and by making his sales in his own State, he may, without restraint or liability, ship his goods all over Ohio without regard to quantity or local regulations. He may do this without paying a cent of Dow tax, or contributing anything to the general revenue of the State in return for the protection of his property and business.

Thus he would be permitted under this law to engage in competition with the Ohio manufacturer on the latter's own ground with this enormous advantage.

The Ohio brewer not only pays a tax upon his plant and goods, but wherever he establishes a store house in the State he is required to pay in each instance three hundred and fifty dollars of Dow tax in addition to the general tax upon the store house and contents.

Once concede the claim of appellant, and foreign brewers will open store houses in every small town in Ohio, where the sale of liquor is not prohibited, and by selling their beer in "original packages" of four quart bottles or more, they will wholly dodge the Dow Law and laugh out of business the native producer under his heavy handicap.

In the case of *Vance v. Vandercook Co.*, it was argued in behalf of the appellee that the state dispensary law of South Carolina was invalid because of discrimination

against non-resident producers of wine; that the law gave to state officers exclusive right to purchase all the liquor to be sold in the State, thereby giving them arbitrary power to exclude the product of one or more States by purchasing elsewhere. The reasoning of Justice White in exposing the fallacy of such an argument is strikingly applicable to the case in hand. He says:

"A more plausible, but equally unsound, proposition, is involved in the contention that the state law in question is inherently discriminatory. The argument by which this is supported is as follows: The law gives to the state officers exclusive right to purchase all the liquor to be sold in the state. The authority to purchase includes the right on the part of the buyer to determine from whom and where the purchase may be made. This gives the officers the opportunity, by exercising their right of purchase, to buy in one state, to the detriment and exclusion of the products of every other state. As no other product, then, but that which the officers buy can be sold in the state, it follows that, although intoxicants will be freely offered for sale in the state only liquors coming from the state in which the officer has purchased will be so sold, and the products of all other states will be excluded from sale, and be thereby discriminated against. And whether these consequences will arise will depend solely upon the arbitrary discretion of the state officers in determining where and from whom the liquor that they propose to offer for sale will be by them purchased. This, it is argued, demonstrates the inherent discrimination arising from legislation which makes state officers the sole persons authorized to buy and sell liquor,—a discrimination whose unjust consequences can only be avoided by recognizing the right of the residents of all other states to ship their products into the state, and sell them in original packages. In the first place, to maintain this proposition, the presumption must be indulged in that the state officer, in purchasing as provided by the state statue, instead of buying fairly and in the best markets, affording an equal chance to all sellers and to every locality, will, on the contrary, so act as to discriminate

against the products of one or more states, and in favor of those of others.

Such a presumption would be equally justified in case the state law authorized only residents to be licensed to sell liquor, and restricted the number of such licenses. The persons so licensed, whether one or one hundred, would buy where they pleased the liquor they proposed to sell; and it would therefore be fully as cogent to argue that they might elect to buy in one place instead of another and thus discriminate against the persons or places from where or from whom they did not buy. The argument will not be strengthened, even if it be conceded that there is a difference between licensing a number of persons to buy or sell, and concentrating the power, to buy all the liquor to be sold, in the hands of state officers, and by further conceding, that whether the statute discriminates against producers of other states is to be determined solely by the power to bring about the discrimination which might arise from its execution, and not by whether the power had been so carried out as to cause an actual discrimination. Under these concessions, *there would doubtless be force in the position taken, if the authority of the state officers to buy the liquor to be by them sold excluded the right of the residents of every other state to ship to the residents of South Carolina liquor for their own use, for in that event the products from the state from which no liquor was bought by the state officers would be wholly excluded from the state, although by the state law liquor could be sold therein by the state agents. But the weight of the contention is overcome when it is considered that the interstate commerce clause of the constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment: and this right is wholly unaffected by the act of congress which allows state authority to attach to the original package before sale, but only after delivery.* Scott v. Donald, supra ; Rhodes v. State of Iowa, supra. It follows that, under the constitution of the United States, every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use. *This demonstrates the unsound-*

ness of the contention that if state agents are the only ones authorized to buy liquor for sale in a state, and they select the liquor to be sold from particular states, the products of other states will be excluded. They cannot be excluded if they are free to come in for the use of any resident of South Carolina who may elect to order them for his use."

Vance v. Vandercook Co., 170 U. S., 450-452.
Black on Intox. Liquors, §48, 69, et seq.
Austin v. The State, 10 Mo., 591.

It will be observed that the Wilson Act gives the State legislature all the power conceded to it in the line of decisions known as the License Cases, and all that is claimed for it by the dissenting Justices in the case of *Leisy v. Hardin.* The views expressed in those cases, in the light of the Wilson Act, furnish a stronger argument than I can hope to make against the extraordinary position of appellant.

Consideration of the opinion of Judge Thompson, of the Circuit Court, in this case, is respectfully requested. (See Record, p. 12.)

Respectfully submitted,

ADDISON C. LEWIS,
Counsel for Appellee.